RECENT CASES.

ADMIRALTY—COLLISION AT SEA—RECOVERY BY OWNER OF CARGO.—In a recent English decision in the House of Lords it was held that, where there has been a collision between two ships in such circumstances that both vessels are to be deemed in fault, and cargo on one of the ships has been damaged by the collision, the owners of the cargo so damaged, being in no way identified with the owners of the carrying ship, can recover only one-half their damages from the owners of the other ship. Owners of Cargo of Steamship "Tongariro," v. Astral Shipping Company, 103 Law Times, 773 (Eng., 1910). See to same effect "The Drumlanrig," 79 L. J. P. 100 (1910).

The judges in coming to this conclusion express their dissatisfaction with the result, but feel bound to follow the law as established earlier in the Court of Admiralty, because of section 25, sub-section 9 of the Judicature Act of 1873, which provides that: "In any cause or proceeding for damages arising out of collision between two ships, if both ships should be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail." This law is that the owner of the cargo could recover only one-half his loss from the other ship. The "Milan," 5 L. T. Rep. 590. In a case decided in the House of Lords in 1888, it was held that, where a collision was due to the fault of both ships, and two innocent persons on one of the vessels were killed as a result, their representatives could recover the whole of the damages from the other ship, the Admiralty rule as to half damages not being applicable to actions under Lord Campbell's Act. The "Bernina," L. R. 13 App. C. 1. This view as to damages is that preferred by the court in the present case for all actions.

The doctrine of the principal case is not followed in the United States, where it is generally held that the owner of the cargo, damaged by a collision due to the fault of both vessels, may recover the full amount of his damages from the other vessel, or the carrying vessel. The "St. Lawrence," 19 Fed. 328; The "Troy," 28 Fed. 861; The "Britannic," 39 Fed. 395; The "Atlas," 93 U. S. 302; The "Franconia," 16 Fed. Rep. 149. It has been held in Arkansas that the owner of goods injured in a collision must share the fate of the vessel on which the goods were shipped, and cannot recover, unless it is proved that her owners would be entitled to recover. Duggins v. Watson, *et al.*, 15 Ark. 118. This is clearly *contra* to the general maritime law, where contributory negligence, even if it could be imputed to one who had shipped goods on the boat in question, (which it cannot), does not bar a recovery; for where both ships are in fault, the law, as between the two ships, apportions the loss by obliging the wrongdoer to pay half the loss of the other. Marsden, Collisions at Sea (6th ed.), p. 123; Hay v. Le Neve, 2 Shaw, Sc. App. 395. The American and English decisions are in accord, on this point, holding that where both vessels are at fault damages should be apportioned. The "Gray Eagle," 9 Wall, 550; The "America," 92 U. S. 432; The "Pennsylvania," 19 Wall, 125.

CHECKS—HOLDER IN DUE COURSE—AGENCY.—In Bowles Co. v. Fraser, *et al.*, 109 Pac. 812 (1910) Wash., the defendant Clark was engaged in the construction of a house in which the defendant Fraser was to supply the plumbing. After partially performing his contract, Fraser informed Clark that to complete the work he needed money for the purchase of materials, which could be procured from the plaintiff. Clark thereupon drew a check to the order of the plaintiff and gave it to Fraser. Fraser, upon transferring the check to the plaintiff, instead of using it entirely for the purchase of materials, used part of it to pay an old debt, secured part as an advance in cash and applied the remainder to his general account. In an action on the check, the court held that the payees were obliged to account to the

drawer for the check or for its proceeds, and when they appropriated it to Fraser's use, they did not so account. Although the plaintiff had the right to assume that Fraser's powers were such as the circumstances surrounding the transaction made them appear to be, these circumstances were not of such a nature as to warrant the belief that the property in the check was the property of Fraser. A person dealing with an agent must use reasonable diligence to ascertain whether the agent acts within the scope of his powers. Recovery was denied.

This unusual case may be viewed from several standpoints. Had Fraser gone to the payee with the check blank as to the payee's name and had in his presence filled it up, the liability of the drawer would have been unquestioned at common law. Russel v. Langstaffe, 2 Doug. 514 (1780); Powell v. Duff, 3 Camp. 181 (1812); Jones v. Shelbyville Ins. Co., 1 Metc. (Ky.) 58, (1858); Rich v. Strabuck, 51 Ind. 87 (1875). This has been directly overruled by the Negotiable Instruments Law, however, which has been supported in the cases where the question has arisen. Guerrant v. Guerrant, 7 Va. L. R. 639 (1902); Boston Steel & Iron Co. v. Sterner, 183 Mass. 140 (1903). But this section of the act has no application to completed instruments and the law merchant should therefore govern, as provided by the act. Although this is not an incomplete instrument, the principles seem so analogous that the principles of the law merchant in respect to incomplete instruments should apply. This would allow recovery.

Furthermore, negligence in the taker will not constitute notice of an infirmity in the paper, and even gross negligence, although it may be evidence tending to show *mala fides*, is not *mala fides*. Murray v. Lardner, 2 Wall, 110 (1864); Davis v. Seeley, 71 Mich. 210 (1888). This principle has remained unchanged under the Negotiable Instruments Law.

One element necessary to constitute the taker of an instrument a holder in due course as laid down by Daniel, Vol. 1, p. 780, 4th ed., is that he must have acquired the paper in the ordinary and usual course of business. Clearly the transaction was not of a common sort, but whether or not it was of such an unusual nature as to constitute a holder not in due course seems questionable. Would allowing recovery in order to give more freedom of circulation to negotiable paper be justified, or is the situation here presented that of drawer and payee who are strangers to each other, such an unusual one that to allow recovery would not be an impetus to freedom of circulation?

The question really resolves itself into this: "Are the drawer and payee of a check in privity?" For if not, the decision cannot be supported. The cases which have raised this point are comparatively limited in number, but there seems to be an unanimity of opinion that mere proximity will not make privity. Nickerson v. Howard, 19 Johns. 113 (1821); Horn v. Fuller, 6 N. H. 511 (1834); Peterborough & Shirley R. R. v. Chamberlin, 44 N. H. 494 (1863); Munroe v. Bordier, 8 Manning, Granger & Scott, 861 (1849); South Boston Iron Co. v. Brown, 63 Me. 149 (1873). Is there any valid reason why a creditor should not accept as payment from his debtor the latter's check payable to a third person, to whom the creditor is indebted, and should the third person take the check at his risk? Is the fact that the parties to an instrument are strangers to each other an unusual state of affairs in business transactions; *e. g.*, foreign draft?

Another error into which the court seems to have fallen is that of regarding Fraser purely in the light of an agent. Part of the work was completed and part of the check may well be taken to have been given in payment for the work already done. He was really an independent party. For a contrary viewpoint on almost exact facts, see South Boston Iron Co. v. Brown, *supra*.

Altogether, the case seems to have been decided upon a cursory view of authorities, and is not substantiated by the principles of the law merchant.

CONTRACTS—ILLEGALITY—PART PERFORMANCE ON SUNDAY.—A Missouri statute provides that every person who shall labor, or compel or permit any person in his charge to labor, on Sunday, shall be guilty of a misdemeanor. Under this statute, it was held in Knapp and Co. v. Culbertson, *et al.*, 133 S. W. Rep. 55 (1910), that a contract stipulating for the insertion of advertisements in all the editions of a Sunday newspaper, was void, it being

shown that two of the four editions of the paper was printed on Sunday morning.

The decision is based on the well-known principles of contract that an agreement to commit a crime or indictable offence is void), Pollock on Contracts, Third Am. Ed. (1906), 374; Barker v. Parker, 23 Ark. 390 (1861); and that if any part of a single consideration for a promise or set of promises is unlawful, the whole agreement is void. Pollock, 483, and cases cited.

So it has been held that a contract for the employment of one to give two theatrical performances a day at a music hall for a fixed period, including Sunday, is void, under a statute similar to the statute given above. Hallen v. Thompson, 96 N. Y. Sup. 142 (1905). And where a contract requiring certain services to be performed on week-days and Sundays is entire, and, because calling for a violation of the Sunday law, is void *in toto*, one who has rendered services thereunder cannot recover on a *quantum meruit*. Stewart v. Thayer, 170 Mass. 560 (1898).

However, it has been held in Wirth v. Calhoun, 64 Neb. 316 (1902), that a statute providing for the punishment of persons sporting on Sunday, or found at common labor, does not render a contract for theatrical performance on Sunday contrary to public policy. The decision in the recent Missouri case seems to reflect the sound view of the law in such case.

CONTRACTS—IMMORAL CONSIDERATION.—Lessor's agent re-let a flat to defendant, knowing that she was a mistress of one H, that he frequently visited her there, and that the rent would come indirectly from him. In an action for rent it was held that the consideration and the obligations of the parties are tainted with immorality, and therefore the plaintiff cannot recover. Upfill v. Wright, 103 L. T. 834 (Eng., 1910).

The general rule is, that whenever a contract has been entered into for the performance of an immoral act, or where the consideration is immoral, the courts will not lend their assistance to the enforcement of the contract. Contracts tending to promote fornication and prostitution are void as being *contra bonos mores*. Addison, Contracts (10th ed.), 71. Consequently an action is not maintainable to recover the rent of premises knowingly let for the purpose of prostitution. Humstock v. Palmer, 23 S. W. 294 (Tex., 1893); Ralston v. Boady, 20 Ga. 449 (1856). *Contra:* Lyman v. Townsend, 24 La. Ann. 625 (1872); nor to recover for the board of prostitutes kept by plaintiff for gain. Mackbee v. Griffith, 2 Cranch, C. C. 336 (1872); nor for board furnished defendant for the purpose of maintaining her in leading an immoral life. Postelle v. Rivers, 112 Ga. 850 (1900); nor for the hire of a brougham supplied to defendant with a knowledge that it would be used by her as a part of her display to attract men. Pearce v. Brooks, L. R. 1 Ex. 213 (Eng., 1866).

But it is clear that "a prostitute must have a lodging as well as other people," and if she uses it merely to live in, and plies her trade elsewhere, certainly there is no objection to a recovery of rent. Appleton v. Campbell, 2 C. & P. 347 (1826). Considering the fact that the evidence in the principal case did not show defendant to be a common prostitute, and that there was no evidence of any other person visiting her but H, it would seem that the flat was primarily her home, and that the case goes the full limit of, if not beyond, the law.

CONTEMPT—PUBLICATIONS CONCERNING THE ACCUSED IN PENDING PROCEEDINGS.—After the issuing of a warrant for the arrest of the accused, his arrest thereon, and arraignment in Canada for extradition to England, but before he had been accused before a magistrate in England, the prisoner was falsely reported, by a London newspaper, to have confessed the killing of his wife. The Court of King's Bench fined the editor of the newspaper for contempt of court in having published a statement tending to prejudice a fair trial. Rex v. Clarke, *et al.; ex parte* Crippen, 103 Law Times, 636 (K. B., 1910).

As early as 1742, Lord Hardwicke asserted the power of the court to punish for contempt, any one who publishes anything about an accused person before his cause is heard, which would tend to prejudice mankind against

him. *In re* Huggonson, 2 Atkyns, 469. This proposition has never since been doubted, and the power which it gives the courts has been frequently exercised both in England and America. The only doubt that could arise as to the authority of American courts to punish for contempt in such case, would have its foundation in constitutional provisions in some of the States. But it has been held that the status of contempts as to pending causes is not affected by a constitutional provision guaranteeing to every person freedom to speak or publish whatever he will, nor by provisions requiring prosecutions of offenses by indictment or information, and providing that no warrant shall issue without probable cause supported by oath or affirmation reduced to writing. People v. News-Times Pub. Co., 35 Colo. 253 (1906). Nor is trial by jury essential to "due process" in contempt proceedings. Eilenbecker v. Plymouth Co., 134 U. S. 31 (1889).

The right to punish for contempt in cases like Rex v. Clarke, *supra,* being clear, the question arises whether the publication by the defendant was, in fact, contemptuous? The English court, as well as counsel for the defendant, took it for granted that the statement that the accused had confessed, whether true or untrue, tended to prejudice his right to a fair and impartial trial, and was, therefore, a contempt of court. It is doubtful whether in most American jurisdictions the statement in question would have been so freely conceded to be contemptuous. However, it has been decided that the publication of statements of facts, evidence of which would not have been competent at the trial of the cause, and which would likely be read by the judge and jury sitting on the trial, and would have a tendency to influence the determination of the cause, is a contempt. Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294 (1899). So, also, the publication of a discussion of a portion of the Government's evidence supposed to have been prepared for trial. Globe Newspaper Co. v. Commonwealth, 188 Mass. 449 (1905). If the court assumes to punish as contempts, publications which tend to prevent the fair and impartial administration of justice, it is submitted that it can spend its energy to no better advantage than to end the American practice of publishing the very type of sensational statement concerning persons accused of capital offenses which came before the court in Rex v. Clarke.

The only question which troubled the English court was whether the statements were published during a pending cause, since the prisoner had not yet been charged with the crime in a magistrate's court. In Rex v. Clarke, 1903 L. R. 2 K. B. Div. 432, the court decided that a cause was pending when the accused was arraigned in the magistrate's court, even though he had not yet been committed. This decision went on the ground that the Judicature Act of 1873 made the inferior courts of record branches of the Court of King's Bench; and that since the higher court was empowered to prevent the inferior courts from exceeding their jurisdiction, it could also protect them from contempts in cases where they did not themselves have the necessary power. That being so, it was only necessary for the court in the recent case to decide that issuing a warrant is a judicial act in order to hold the defendant; and they readily reached this conclusion.

In the United States, magistrates' courts are not courts of record, nor can they be considered branches of the superior courts in such a sense as to give the higher courts jurisdiction to protect them from contempt. In Globe Newspaper Company v. Commonwealth, *supra,* the court held that the publisher of an objectionable statement may be in contempt, although at the time of publication the trial was not in progress nor immediately to take place, if an indictment had been found against the accused. This is as far as the courts of this country can go.

The desirability of such a power as is lodged in the Court of King's Bench to punish anything which tends to prejudice a fair trial, is obvious. It has been suggested by Mr. Untermeyer, of the New York bar, that a similar protection might be given trials in this country by enacting statutes making publications of the kind in question at any time after the issuing of the warrant, misdemeanors. It may be doubted, however, whether such legislation would be enforceable in practice; and if enforceable, whether it would be enforced.

CRIMINAL LAW—WHO ARE PRINCIPALS.—In the case of Buchanan v. State, 112 Pac. 32 (Okl., 1910), it was held that those who in any way take part in the commission of a crime are principals, regardless of whether they have any interest in or receive any reward for its commission. The case in question was an illegal sale of intoxicating liquor, the evidence tending to prove that the defendant voluntarily procured whiskey for a friend by purchasing it, and was, in reality, a mere go-between. He had, however, received money and given whiskey in return, so that he became, *prima facie*, guilty of a sale without a license. His defence was that he was merely the messenger and agent of the seller and in no way that of the buyer.

Upon this point, whether the voluntary agent of a purchaser of liquor is a principal, the courts stand evenly divided. The above case proceeded on the ground that the statute provided that all who were concerned in the commission of a crime, aiding and abetting, should be principals. This provision must be construed broadly, for otherwise the excuse of "I was only a go-between," might be pleaded in every criminal case of the sort. It is no argument in answer to this to say that the jury could decide that such a defence was a mere subterfuge, for the burden of proof would be on the State and evidence of this sort is often extremely difficult to obtain. Moreover, every sale requires a seller as well as a purchaser, so that the go-between is as much the agent of one as the other, especially as the act of delivery is his and his only. The cases in line with this decision are: Wortham v. State, 80 Miss. 212, 1902; Foster v. State, 45 Ark. 364, 1885. See also Clark, Crim. Law, § 53, and cases cited. The case of Foster v. State (*supra*), is extreme in that the sale was to a minor, and by statute minors were not responsible criminally for procuring the sale of liquor to themselves. It is of interest to note that the court in the case under discussion reversed a decison of its own made only a year previous in Reed v. State, 103 Pac. 1070 (Okl., 1909).

Upon the other side of the question the argument is that a man who takes money from another and with it purchases liquor from a third—if he is not interested in the sale and receives no part of the money—is not guilty of selling, and this is the only offence covered by the statute. There is no law that prohibits the purchase of liquor for oneself or another. Anderson v. State, 32 Fla. 242, 1893; Maxwell v. State, 140 Ala. 131, 1904. The last case may be compared to Foster v. State (*supra*), as there also the purchase was by agent of a minor.

The weight of authority, if any, is upon the side of the latter cases. However, it is probable that the view taken in the present case is preferable for the reasons of policy given. In almost all cases of this sort the real intent is to obtain liquor illegally, *e. g.*, on Sunday or in "dry" towns. If there is any reason for enacting statutory regulations of this sort, the same reason requires an extension of their application to all persons who violate their spirit, provided at the same time that no legal principle is contraverted. It does not seem that such a decision is contrary to the rules regarding principals, for as the "go-between" commits the act himself, he is either a principal in the fullest sense of the word, or else he has no connection with the crime whatever. Therefore, there seems to be reason for following Buchanan v. State (*supra*), whereas the argument against it is confined to the strict interpretation of the technical term "sale."

EVIDENCE—PRESUMPTION AS TO FOREIGN LAW.—In Parott v. Mexico Cent. Ry. Co., 93 N. E. 590 (Mass., 1911), the plaintiff brought an action on an oral executory contract made under the laws of Mexico. There was no evidence of what was the law of Mexico, but the court allowed the plaintiff to recover. *Held:* The presumption that the law of a foreign jurisdiction is, in the absence of evidence, the law of the forum, does not apply in all cases. Where the foreign jurisdiction is known to have the common law, it may be presumed to regard it in all its details, but where a different system of law exists it will only extend to the broadest principles of legal right and wrong, common to all civilized countries.

The decision seems sound and well within the most conservative rules in regard to presumptions of the law of foreign countries. The court is

careful not to adopt the rule that in all cases the law of a foreign country is to be presumed to be that of the forum, and in so limiting the application of the presumption would seem to disagree with the doctrine of several earlier Massachusetts cases. Thus in Harvey v. Merrill, 150 Mass. 1 (1889), where the question arose as to the law of Illinois, Field, J., said: "The rights of the parties are to be determined by the law of Illinois, but there is no evidence that the common law of Illinois differs from that of Massachusetts. * * * We are, therefore, to determine whether the contract is illegal and void by the common law of Massachusetts." Of like effect are the words of Knowlton, C. J., in Mittenthal v. Mascagni, 183 Mass. 19 (1903): "Assuming this (that the case was to be considered upon the declaration and admitted facts only), we must also assume that the law of Italy is like our own"; and also in Bayer v. Lovelace, 204 Mass. 327 (1910); "We are not informed as to what the law of Colombia is, in reference to such conditions as appear in this case, but there is no reason to think that it is different from that of this country." This rule, that in the absence of evidence to the contrary, the law of a foreign country is presumed to be the law of the forum, is adopted by the courts of New York: Haynes v. McDermott, 82 N. Y. 41 (1880); New Jersey: Teake v. Bergen, 27 N. J. Eq. 360 (1876), and Minnesota: Desnoyer v. McDonald, 4 Minn, 315 (1860), and is the law in Pennsylvania: Bollinger v. Gallagher, 144 Pa. 205 (1891).

Those who adopt the conservative rule expressed in the principal case look at the presumption as purely a rule of evidence founded on the probative value of facts within the knowledge of the court. See Mr. Bigelow's note, Story on Conflict of Laws, § 637. It is submitted that the rule is not so much a rule of evidence as a rule of procedure, founded not on any question of probability, but on consideration of expediency and procedural justice. It would seem fair that the party wishing to enforce a right or avoid a liability under a foreign law should be required to introduce evidence of that law in cases where it is different from that of the forum. This view is well expressed by Mr. Justice Williams in Bollinger v. Gallagher, 144 Pa. 205 (1891): "The laws of an existng State are not taken judicial notice of by the courts of this State, and for that reason they will be assumed to be the same as our own unless shown by competent evidence to be different."

The principal case was well within both rules and did not require a general review and statement of the law, but this having been done, the court has definitely placed Massachusetts among those States which treat the rule as purely one of evidence justified by the probative value of the facts which give rise to it.

FIXTURES—LIFE TENANT AND REMAINDERMAN.—A testator devised a life interest in an ancient mansion, which contained valuable wood carvings attached to the interior walls, to his son with remainder over. The son removed and sold one carving. It was held in a suit brought by the remainderman that the carvings were fixtures, part of the building itself, and that the proceeds of the sale were subject to the settlement. Lord Chesterfield's Estates, 13 Law Times, 823 (Eng., 1910).

The question whether a chattel which has been annexed to real estate thereby loses its character as personalty and becomes a part of the realty, is so confused that even the proper definition of the term "fixture" is in doubt. A fixture has been defined as a chattel so affixed as to be an inseparable part of the realty, Co. Lit. 53, A 4; as a chattel annexed to real estate, but which is removable, Bouvier's Law Dict.; and lastly, as a chattel associated with land concerning which the question most often arising is its removability, Brown on Law of Fixtures (4th ed.), pp. 1-3. In reading the great majority of opinions and text-books, the context must be carefully examined to determine the meaning of the term "fixture" wherever it occurs. The English judges observing that it is a solecism—a contradiction in words—to speak of a "removable fixture," use the term in its original sense.

Viewed as a whole, the cases concerning fixtures are conflicting, but

taken chronologically they consistently show a gradual relaxation of the early rule, *quicquid plantatur solo solo cedit.* By degrees the courts have adopted less rigid rules, until now the recognized criterion of a fixture is whether the party who annexed the chattel intended thereby to make a permanent accession to the freehold. Teaff v. Kewitt, 10 Ohio St. 511 (1853). But this intent is not the secret, unrevealed intention of the party, but the intent fairly deducible from all the circumstances. Bank v. North, 160 Pa. 303 (1894). Various factors must be considered in determining the intent. The relation of the parties interested is important, landlord and tenant, heirs and personal representatives, co-tenants, mortgagor and mortgagee, and so on. The nature and manner in which the chattel is annexed.

Where the permanent owner associates chattels with realty, the ostensible purpose of the annexation is a useful criterion. So where statuary has been so placed as to evidently form part of a complete architectural plan, it is a fixture. D'Eyncourt v. Gregory, L. R. 3 Eq. 382 (1866); but where similar articles have been set up for mere ornament, they remain chattels. Pfluger v. Carmichael, 54 App. Div. 153 (N. Y., 1900). Where the life tenant stretched tapestry upon the walls of a magnificent room, his executor was allowed to remove them. *In re* Falbe (1901), 1 Ch. 523; but where, as in the principal case, the life tenant received the ancient house with the tapestries already in place, they were held to be fixtures. Norton v. Dashwood (1896), 2 Ch. 497. There is no arbitrary rule by which it may be determined whether or not a particular chattel annexed to real estate is a chattel. The question is usually one for the jury. Hook v. Bolton, 199 Mass 244 (1908); Silliman v. Whitmer, 196 Pa. 363 (1900).

INSURANCE—DOES ASSIGNMENT FOR BENEFIT OF CREDITORS CARRY THE RIGHT OF CASH SURRENDER VALUE?—A was insured under an endowment policy providing (*inter alia*) for payment on his decease to his children, and that he or his assigns might surrender the policy at any time during its term at a scheduled cash value. A assigned for the benefit of his creditors all his property except that exempt by law from execution, whereupon the assignee brought a bill to determine his rights. *Held,* that the right of surrender is a valuable property right which passed by the terms of assignment. Blinn v. Dame, 93 N. E. 601 (Mass., 1911).

As a general rule, if no phraseology in the policy indicates a different intent, the right of the beneficiary becomes vested absolutely as soon as the contract is made. Glanz v. Gloeckler, 104 Ill. 573 ( ). *Contra,* Breitung's Est., 78 Wis. 33 (1890). But, obviously, a provision enabling the insured to change beneficiaries gives them only a conditional interest. Martin v. Stubbings, 126 Ill. 387 (1888); and it would appear that, in the principal case, the children's interest was contingent on the death of the insured before the expiration of the policy, on their surviving him, and on the non-surrender of the policy.

The courts are uniform in holding that an option to accept a cash surrender value is property and passes to the trustee in bankruptcy. *In re* Slinghuff, 106 Fed. 154 (1900); Hiscock v. Mertens, 205 U. S. 202 (1906). And certainly the position of an assignee is analogous to that of a trustee. Moreover, "it is a novel idea that a man may have insurance which he may collect and use if he remains solvent, but that if he becomes insolvent his creditors cannot reach it. * * * There is no reason that money payable by an insurance company should stand differently from money payable under other engagements or settlements." Hobson, J., dissenting in McCutcheon v. Townsend, 105 S. W. 937 (Ky., 1907).

It is commonly argued, "that it is such a laudable thing for a person when solvent to make secure provision for the future necessities and comfort of those who are naturally and properly dependent upon him, that, upon his insolvency, the courts will not thwart his well laid plans. McCutcheon v. Townsend (*supra*). In line with this thought, many jurisdictions have, by statute, exempted from the claims of creditors insurance policies taken out for the benefit of dependent relatives. See Pa. Act of Assembly, 1868, P. L. 103. But this argument is not applicable to the principal case, inasmuch

as the children's interest was contingent on three different events, on the happening of which the proceeds would go to A or his estate, it might be said that the policy was taken out as much for A's benefit as for his beneficiaries. A fair construction to place on the insured's intent is, that he intended the children to benefit only providing he did not have need for the money. This construction certainly justifies the decision, and is supported by authorities as shown.

MUNICIPAL CORPORATIONS—INDEMNITY FOR NEGLIGENCE IN PERMITTED DISCHARGE OF FIREWORKS.—A municipality, by resolution of the Board of Aldermen, temporarily suspended city ordinances forbidding discharge of fireworks in the city, in so far as they related to meetings and parades of political parties in a specific campaign. Certain fireworks, which were about to be exhibited in a street in the centre of the city by such a political party, were accidentally discharged, injuring a bystander. The injured party recovered damages in a suit against the municipality. *Held:* The latter may recover over from the person in charge of the exhibition. City of New York v. Hearst, 126 N. Y. S. 917 (App. Div., 1911).

While admitting, as was held in Landau v. City of New York, 180 N. Y. 48 (72 N. E. 631), that the suspension of the ordinance was in fact a granting of a license to hold the exhibitions in question, the court hold that the city was not in *pari delicto* with defendant, because what was licensed was not a nuisance *per se,* but an act, which, if improperly done, might be a nuisance, but, if properly done, would be no nuisance at all. Melker v. City of New York, 190 N. Y. 485. The fact that the deceased's administrator recovered from the city did not necessarily mean that it was a principal in the act, except as to the deceased. The court admit the doctrine, established in Merryweather v. Nixon, 8 Term Reports, 186, that there cannot be contribution between joint tortfeasors; but they contend that in this case the city and Hearst do not stand in such a relation. Much the same principle, though on different facts, was likewise adopted by the Connecticut court in the case of The Town of Waterbury v. The Waterbury Traction Co., 74 Conn. 152, where it was decided that a municipality, which had been forced to pay damages to a person injured by a defective highway, due to the traction company's taking down, and failing to replace, a railing by the roadside, could recover from the company the amount paid as damages in the previous suit. It will be seen, however, that a slight variation of the principle involved by the facts will lead to a contrary decision. In Village of Geneva v. Brush Electric Co., 3 N. Y. Supp. 595, Supr. Ct., it was held that a municipality could not recover over from an electric company damages which it had been forced to pay to one injured by the falling of a pole belonging to the company, but which had been erected by the company's assignor, and left standing with the consent of the municipality. In the suit by the injured person against the municipality the pole, as located, was found to be a nuisance. The explanation of this decision, according to the court in the present case, is: "There the vilage was an active participant in the erection and maintenance of the pole in the position in which it was placed, and the fact that it was placed there of itself made it an unlawful obstruction." The report of the case does not bear out the first statement, and the true ground of distinction seems rather to be, as suggested by the court in that case, that the electric company did no affirmative act toward placing the pole in its position, and had made no use of it.

The general exception to the doctrine laid down in Merryweather v. Nixon, *supra,* is shown in Armstrong County v. Clarion County, 66 Pa. 218. Here a traveler, while passing over a bridge maintainable by the two counties, was injured by its breaking down. He recovered from one of the counties, and that one in turn recovered contribution from the other, the court holding that the rule that there cannot be contribution between wrongdoers, does not apply where the plaintiff cannot be presumed to have known that he was doing an unlawful act.